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No. 05-1120

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In The
Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT CO_2 LITIGATION GROUP

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TABLE OF CONTENTS

Page

INTRODUCTORY STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Petitioners Have Not Demonstrated that Unambiguous Language of the Clean Air Act Gives EPA Authority To Regulate Emissions for Purposes of Mitigating Global Climate Change 6

II. EPA's Interpretation of Its Limited CAA Authority To Address Global Climate Change Is Reasonable and Consistent with the Remainder of the Statute 14

A. Incompatibility Between Global Climate Change and Clean Air Act Regulatory Programs 16

B. The Adverse Economic and Political Consequences of Forcing Global Climate Change into the Clean Air Act Regulatory Framework Would Be Enormous 24

III. Congress Has Yet To Enact the Regulatory Program Petitioners Ask this Court To Find 31

CONCLUSION 39

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 23

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 6, 9, 13

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 15

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 6, 15, 25, 38

Erlenbaugh v. United States, 409 U.S. 239 (1972) 38

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 15

Ratzlaf v. United States, 510 U.S. 135 (1994) 9

Shapiro v. United States, 335 U.S. 1 (1948) 10

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 10, 23

Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 11, 16

Union Electric Co. v. EPA, 427 U.S. 246 (1976) 10, 16, 22

United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 15

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 12

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 15, 16, 18, 38

TABLE OF AUTHORITIES – Continued

Page

DOCKETED CASES

Coke Oven Environmental Task Force v. U.S. EPA, D.C. Cir. No. 06-1131 (and consolidated cases) (pending) 29

Commonwealth of Massachusetts, et al. v. Horinko, D. Conn. No. 3:03CV984 (PCD) (dismissed) 29

STATUTES

Global Climate Change Prevention Act of 1990, 7 U.S.C. § 6701, *et seq.* 33, 36

7 U.S.C. § 6702(c) 36

National Climate Program Act (1978), 15 U.S.C. § 2901, *et seq* 33

Global Climate Protection Act of 1987, 15 U.S.C. § 2901 note 33

Global Change Research Act of 1990, 15 U.S.C. § 2921, *et seq.* 33, 36

15 U.S.C. § 2931(a)(4) 36

Clean Air Act, 42 U.S.C. §§ 7401, *et seq.* ("CAA") ..... *passim*

§ 101(a)(3), 42 U.S.C. § 7401(a)(3) 18

§ 101(b), 42 U.S.C. § 7401(b) 11

§ 103(g), 42 U.S.C. § 7403(g) 35, 36

§ 103(g)(1), 42 U.S.C. § 7403(g)(1) 36

§ 107, 42 U.S.C. § 7407 11

§ 107(a), 42 U.S.C. § 7407(a) 17, 18

§ 107(d)(1)(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i) 18

TABLE OF AUTHORITIES – Continued

Page

§ 108, 42 U.S.C. § 7408 11
§ 108(a)(1), 42 U.S.C. § 7408(a)(1) 16, 17
§ 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A) 28
§ 108(a)(1)(B), 42 U.S.C. § 7408(a)(1)(B) 10
§ 108(a)(2), 42 U.S.C. § 7408(a)(2) 10, 17
§ 109, 42 U.S.C. § 7409 ..... 11, 17
§ 109(b)(1), 42 U.S.C. § 7409(b)(1) 17, 21
§ 109(b)(2), 42 U.S.C. § 7409(b)(2) 10
§ 110, 42 U.S.C. § 7410 18
§ 110(c)(1), 42 U.S.C. § 7410(c)(1) 18
§ 110(m), 42 U.S.C. § 7410(m) 19
§ 111, 42 U.S.C. § 7411 ..... 29, 30
§ 111(a)(1), 42 U.S.C. § 7411(a)(1) 20
§ 111(a)(3), 42 U.S.C. § 7411(a)(3) 19, 20
§ 111(a)(7), 42 U.S.C. § 7411(a)(7) 20
§ 111(a)(7)(B), 42 U.S.C. § 7411(a)(7)(B) 11
§ 111(b), 42 U.S.C. § 7411(b) 20
§ 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A) 20
§ 111(d), 42 U.S.C. § 7411(d) 20
§ 123, 42 U.S.C. § 7423 22
§§ 160-169, 42 U.S.C. §§ 7470-7479 19
§ 165(a)(4), 42 U.S.C. § 7475(a)(4) 19
§ 165(a)(7), 42 U.S.C. § 7475(a)(7) 22
§ 169(1), 42 U.S.C. § 7479(1) 22

TABLE OF AUTHORITIES – Continued

Page

§ 169(3), 42 U.S.C. § 7479(3) 19

§ 171(3), 42 U.S.C. § 7501(3) 19

§ 173, 42 U.S.C. § 7503 19

§ 173(a)(1)(A), 42 U.S.C. § 7503(a)(1)(A) 19

§ 173(a)(2), 42 U.S.C. § 7503(a)(2) 19

§ 173(c), 42 U.S.C. § 7503(c) 19

§ 179(b), 42 U.S.C. § 7509(b) 19

§ 202(a), 42 U.S.C. § 7521(a) 10

§ 202(a)(1), 42 U.S.C. § 7521(a)(1) 10, 16, 26, 28

§ 202(i)(2)(A), 42 U.S.C. § 7521(i)(2)(A) 16

§ 302(d), 42 U.S.C. § 7602(d) 11

§ 302(g), 42 U.S.C. § 7602(g) 7, 12, 13

§ 302(h), 42 U.S.C. § 7602(h) 13

Clean Air Act Amendments of 1990, Title IV, 42 U.S.C. ch. 85 subch. IV-A 31

§§ 401, 403-405, 42 U.S.C. §§ 7651, 7651b-7651d 32

§ 602(a), (b), 42 U.S.C. § 7671a(a), (b) 35

§ 602(e), 42 U.S.C. § 7671a(e) 35, 36

Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 8

42 U.S.C. § 4901 8

Energy Security Act of 1980, Title VI, 42 U.S.C. §§ 8911-8912 33

TABLE OF AUTHORITIES – Continued

Page

Energy Policy Act of 1992, Title XVI, Pub. L. No. 102-486 36

§§ 1602(a), (g), 42 U.S.C. §§ 13382(a), (g) 37

§ 1605(a), 42 U.S.C. § 13385(a) 37

§ 1605(b), 42 U.S.C. § 13385(b) 37

Pub. L. 91-604, § 15(a)(1), 84 Stat. 1710 8

Pub. L. 95-95, § 301(c), 91 Stat. 769 8

Pub. L. 101-549, § 108(j), 104 Stat. 2468 12

Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XVI, §§ 1610(b)(1), (c)(1), 1611, 119 Stat. 595, 1109 37

REGULATIONS AND FEDERAL REGISTER NOTICES

40 C.F.R. § 50.1(e) 11

61 Fed. Reg. 9905, 9905 (1996) 3

63 Fed. Reg. 6426, 6454 (1998) 3

71 Fed. Reg. 9865 (Feb. 27, 2006) 29

LEGISLATIVE HISTORY

House Comm. Rep. 91-1146, reporting H.R. 17255, June 3, 1970, 91 Cong. House Report 1146, *Leg. Hist. of the Clean Air Act of 1970* at 18 10

H.R. Rep. 101-490, pt. 1, at 159, 1990 Legis. Hist. at 3168 33

H.R. Rep. 101-490, pt. 1, at 167, 1990 Legis. Hist. at 3181 32

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. 101-490, pt. 1, at 356, 1990 Legis. Hist. at 3021, 3388 32

1990 Legis. Hist. at 5178, 7248 34

Sen. Debate on S.1630 (3/5/1990), 1990 Legis. Hist. 5189-90 34

S.1630, 103d Cong. § 206 (1989), 1990 Legis. Hist. at 8036-38 34

S. Rep. 101-238 at 98-100, 1990 Legis. Hist. 8338 at 8438-40 34

S. Rep. 101-238 at 685, 1990 Legis. Hist. 8338 at 9025 34

S. Rep. 101-238 at 686, 1990 Legis. Hist. 8338 at 9026 35

H.R. Rep. 102-474, pt. 1, at 152 (1992), 1992 U.S.C.C.A.N. 1953, 1975 37

151 Cong. Rec. S6878, S6892-96 (daily ed. June 21, 2005) 37

151 Cong. Rec. S7029 (daily ed. June 22, 2005) 37

INTRODUCTORY STATEMENT

The CO_2 Litigation Group, which intervened below in support of Respondents Environmental Protection Agency, *et al.* ("EPA"), is an informal group whose members are all trade associations or other organizations representing businesses that would be affected by regulation of emissions of carbon dioxide ("CO_2") and other substances believed by many to contribute to global climate change ("greenhouse gases"). These organizations represent a broad spectrum of U.S. business and industry. Each organization has among its members businesses that burn fossil fuel and other organic matter (such as wood), which unavoidably generates CO_2. In addition, in some cases the organization's members also are involved in: the production or marketing of fuels, both for motor vehicles and for boilers and other "stationary sources"; the manufacture or marketing of fuel-burning equipment; the use of oil or natural gas as a raw material for the manufacture of other chemicals; the oxidation of carbon as a process chemical (as in steelmaking); or business activities dependent on the public's use of fossil-fuel-burning vehicles (such as highway construction and operation of convenience stores).[1]

The organizations comprising CO_2 Litigation Group are: the American Chemistry Council, the American Forest & Paper Association, the American Iron and Steel Institute, the American Petroleum Institute, the American Road & Transportation Builders Association, the Business Roundtable, the Chamber of Commerce of the United

[1] For brevity, this brief sometimes refers to "CO_2 Litigation Group" to mean the members of the trade associations or other organizations that in turn comprise CO_2 Litigation Group.

States of America, the National Association of Convenience Stores, the National Association of Manufacturers, the National Petrochemical and Refiners Association, the Portland Cement Association, the Society of Independent Gasoline Marketers of America, the Specialty Steel Industry of North America, and the Steel Manufacturers Association.

The CO_2 Litigation Group's members believe that global climate change is a highly complex phenomenon, and that many of the statements in Petitioners' brief (and the briefs of many of the *amici curiae*) about its extent and causes are oversimplified and overstate the certainty of its potential future course and effects. The CO_2 Litigation Group's members do agree, however, that the potential for global climate change and the possible role of anthropogenic emission sources in global climate change are important public concerns that warrant ongoing research and consideration by the government of the United States (as well as the governments of other countries and transnational bodies). In fact, many of the CO_2 Litigation Group's members already are taking steps to reduce atmospheric loading of CO_2 and other greenhouse gases from their activities, through voluntary measures such as improving energy efficiency or providing "carbon sinks" where CO_2 is removed from or kept out of the atmosphere (known as "carbon sequestration").

While the ongoing scientific research and political debate may lead to the adoption of mandatory measures to reduce atmospheric loadings of greenhouse gases, as a means to mitigate the potential for global climate change, the CO_2 Litigation Group does not agree with Petitioners that Congress adopted or authorized such mandatory measures over 35 years ago in the Clean Air Act of 1970.

Just as importantly, the CO_2 Litigation Group believes strongly that the regulatory mechanisms in the Clean Air Act, designed to address adverse effects of particular emission sources on the ambient air to which humans, plants, and animals are exposed, are not appropriate for addressing a global problem believed to be caused by concentrations in the global atmosphere of substances that are contributed to (and removed from) the atmosphere by a wide range of human activity and natural processes around the world.

Regulating greenhouse gas emissions under the Clean Air Act in order to mitigate global climate change[2] would subject those emissions to a range of requirements that are either inappropriate or ineffective for that purpose. This reality, ignored or dismissed by Petitioners and their supporters, is a key factor underpinning EPA's

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[2] Some compounds whose emission is believed to contribute to global climate change may also have adverse health effects in the ambient air (unlike carbon dioxide, which is naturally present as a component of ambient air and is essential for most plant life). Methane emissions, for example, might present an explosion risk or adverse health effects at ground level. But regulation of methane as an air pollutant because of those effects does not mean that the Clean Air Act also authorizes regulation of methane emissions for the entirely different purpose of controlling its concentration in the global atmosphere for purposes of mitigating global climate change. Petitioners suggest that EPA's mention of potential global warming effects of methane emissions, in connection with the promulgation of a rule limiting ground-level methane emissions from new landfills, constitutes a determination that greenhouse gas emissions can be regulated for climate change purposes. Pet. Br. at 34, *citing* 61 Fed. Reg. 9905, 9905 (1996) and 63 Fed. Reg. 6426, 6454 (1998). But those EPA Federal Register preamble statements merely recognize that methane emissions, regulated in that rule as air pollutants affecting ambient air quality, may also contribute to global climate change when they result in an increase in the methane concentration of the global atmosphere.

interpretation of its Clean Air Act authorities, and a fatal flaw in Petitioners' efforts to force EPA to regulate greenhouse gas emissions under the existing statutory framework. No matter how serious a concern global climate change may be, that concern does not justify trying to shoehorn global climate change into a regulatory structure designed and enacted by Congress to address different types of problems.

SUMMARY OF ARGUMENT

Petitioners claim that a few isolated words in the Clean Air Act unambiguously authorize a massive new type of regulatory program never even mentioned by Congress. In fact, though, applying traditional tools of statutory construction, what is clear instead is that Petitioners' interpretation is not an appropriate construction of the Clean Air Act, while EPA's interpretation is both permissible and appropriate. Petitioners ignore critical elements of the definition of "air pollutant," including "air pollution agent" and "ambient air." Their interpretation also would make the definition of "air pollutant" internally inconsistent in several respects. Petitioners misconstrue the reference to "weather" and "climate" in the definition of effects on welfare as if those words created new regulatory authority, and contrary to the ordinary meaning of those words.

In considering whether the Clean Air Act clearly authorized regulation of emissions of carbon dioxide and other greenhouse gases for purposes of mitigating global climate change, EPA appropriately considered not just isolated words in the definitions section, but the language

and structure of the regulatory provisions of the Act as a whole. The primary mechanism in the Clean Air Act for improving and maintaining air quality – establishing ambient air quality standards and requiring states to develop measures to control pollutant emissions to ensure those standards will be attained within the state – has no application to atmospheric loadings of greenhouse gases, where an emission of a ton of carbon dioxide in California has the same potential impact on global climate change as a ton emitted in Connecticut . . . or in China.

Recognizing that these and other regulatory provisions make no sense if the definition of "air pollutant" were read to authorize regulation under the Clean Air Act of emissions of greenhouse gases for purposes of mitigating global climate change, EPA reasonably concluded that the isolated words of the statute referenced by Petitioners do not authorize or require a huge, new regulatory program for greenhouse gases, using inappropriate mechanisms. This reading is consistent with the fact that all of the congressional enactments related to greenhouse gases so far have concerned research and data-gathering or other non-regulatory programs, and the fact that Congress has repeatedly considered and rejected proposals to impose limits on emissions of greenhouse gases.

Petitioners argue that the need to address global climate change is so serious that the Court must reject EPA's interpretation of the Act. But no matter how important the issue may be, the Court should not substitute its judgment for the political decisions that the legislative and executive branches have made and continue to make in

addressing this global issue. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

ARGUMENT

Petitioners claim that Congress, speaking "plainly," has given EPA authority to regulate emissions of CO_2 and other greenhouse gases for purposes of mitigating possible global climate change. Pet. Br. at 17. They claim that delegation to EPA of the power to create a new regulatory program affecting a large portion of human activity in this country came not through provisions of the Clean Air Act addressing possible climate change (since those are all non-regulatory), but through the "straightforward" meaning of two definitions contained in the Act. *Id.* at 12, 15, 17. But even leaving aside the propriety of inferring far-reaching regulatory authority from a technical analysis of a definition provision, Petitioners have failed to show, using "the traditional tools of statutory construction," that the language of the Clean Air Act is unambiguous, or that EPA's interpretation that the Act does not extend to emission controls to address global climate change is an impermissible one. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 & n.9 (1984); *Brown & Williamson*, 529 U.S. at 132-33.

I. Petitioners Have Not Demonstrated that Unambiguous Language of the Clean Air Act Gives EPA Authority To Regulate Emissions for Purposes of Mitigating Global Climate Change.

Petitioners claim that their interpretation of EPA's authority under the Clean Air Act is compelled by the

plain meaning of this portion of the definition of "air pollutant" in CAA section 302(g), 42 U.S.C. § 7602(g):

> The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

But Petitioners' interpretation reads both too much and too little into the definition of "air pollutant," ignoring important portions of the language of the definition and supplying words and punctuation not contained therein. The straightforward reading of the definition is that it covers only something that is emitted into the ambient air and which EPA determines causes pollution of the air. And that is the reading that EPA followed in rejecting the rulemaking petition at issue in this case. *See* Pet. App. A-78.

"Air pollutant" is defined to "mean" "any air pollution agent. . . . " *Id.* But Petitioners effectively read "air pollution agent" out of the definition of "air pollutant." They assert that everything falling within the phrase in the definition "including any physical, chemical, biological, radioactive (including source material, special material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air" is a subset of "air pollutant agent." But Petitioners also assert that *any and every* physical, chemical, biological, or radioactive substance or matter that enters the air is an air pollutant.[3] Pet Br. at 12-13. Under this reading, the

[3] Note that, although chastising EPA for considering subsequent amendments to the CAA in determining whether greenhouse gases may

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only reason that Congress needed to keep the words "air pollution agent" in the definition at all was to make sure that EPA had authority to regulate "phenomena" that cause air pollution but have no mass, like heat or x-rays.[4] Pet. Br. at 14. Petitioners offer no reference for the novel contention that heat, apparently because it causes hot air, is considered an air pollutant, nor any indication that EPA ever considered its Clean Air Act authority to extend to heat "pollution." The same is true of Petitioners' claim that "air pollutant" includes "ionizing radiation," like ultraviolet light – apparently EPA has never in the past three decades exercised this postulated regulatory authority over non-physical factors that, per Petitioners, was the only reason for Congress' inclusion of the phrase "air pollution agent" in the definition of "air pollutant."[5]

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be regulated as "air pollutants" (Pet. Br. at 22-23), Petitioners themselves rely principally on the "including . . . " portion of the definition of "air pollutant" that was added in the 1977 Clean Air Act Amendments, seven years after Congress defined "air pollutant" as an "air pollution agent or combination of such agents" and defined effects on welfare to include effects on "climate" and "weather." *Compare* Pub. L. 91-604, § 15(a)(1), 84 Stat. 1710 *with* Pub. L. 95-95, § 301(c), 91 Stat. 769.

[4] Under Petitioners' reading of the definition of "air pollutant," the Clean Air Act of 1970 also authorized the regulation of noise – which is something else without mass, like heat, that enters the air from mobile and stationary sources. Yet Congress two years later enacted a statute giving EPA (much less extensive) regulatory authority over noise, the Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918. *Cf.* 42 U.S.C. § 4901 (declaring that "inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population" and explaining that purposes of the act include "to establish a means for effective coordination of Federal research and activities in noise control" and "to authorize the establishment of Federal noise emission standards for products distributed in commerce").

[5] Likewise, the four former EPA Administrators who filed an *amicus curiae* brief in support of Petitioners, although arguing that

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By effectively reading "air pollution agent" in the definition as superfluous, i.e., as imposing no limitation on what may be considered an "air pollutant," Petitioners violate the basic principle that an interpretation of a statute must give meaning to all of its words. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).[6] Certainly, in such circumstances, Petitioners' interpretation cannot be considered the only permissible one; nor, for the reasons stated herein, is it even a reasonable one. *See Chevron*, 467 U.S. at 844.

Petitioners' reading of the statute also has the effect (counterintuitive, yet essential for their argument) of separating the concept of "air pollutant" from any notion of "polluting" the air. The Compact Oxford English Dictionary defines the verb "pollute" as "contaminate with harmful or poisonous substances." If *anything* entering the ambient air is considered an air pollutant, then even a substance that is beneficial to humans, like oxygen or water vapor, is treated as if it were contaminating the air.[7]

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they always viewed their authority under the Clean Air Act very broadly, give no indication that they ever considered "phenomena" like heat or non-ionizing radiation to be air pollutants.

[6] EPA's reading of the definition does not ignore the necessary meaning of "including," as Petitioners claim. Pet. Br. at 14. A perfectly logical reading is that the language after "including" is meant to provide examples of things that can be "air pollution agents," not things that invariably are. Put another way, if a statute authorized regulation of "drugs used in the treatment of diseases in children, including substances that are ingested, injected, or applied to the skin," presumably no one would assert that the statute authorizes regulation of orange juice or sunscreen.

[7] The *amicus curiae* brief submitted in support of Petitioners by "Climate Scientists," recognizing the absurdity of this outcome, appears to argue that water vapor, although an air pollutant, is an air pollutant whose emissions "do not 'cause, or contribute,' to pollution implicated in

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This illogical result argues strongly against the Petitioners' interpretation of the statutory language. *See, e.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 204 (1978); *Shapiro v. United States*, 335 U.S. 1, 31 (1948).

Petitioners also effectively ignore the phrase "which is emitted into or otherwise enters the ambient air" in the definition of "air pollutant" in CAA section 302(g). This focus on ambient air is a key attribute of the Clean Air Act, which was enacted "to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the *air we breathe throughout the Nation* is wholesome once again." House Comm. Rep. 91-1146, reporting H.R. 17255, June 3, 1970, 91 Cong. House Report 1146; *Leg. Hist. of the Clean Air Act of 1970* at 18 (emphasis added). EPA is directed to derive National Ambient Air Quality Standards, the cornerstone of air pollution control under the CAA,[8] for "any air pollutant . . . the presence of which *in the ambient air* results from numerous or diverse mobile or stationary sources . . . . " CAA section 108(a)(1)(B), 42 U.S.C. § 7408(a)(1)(B) (emphasis added).[9] "Ambient air" has long been defined by EPA as

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anthropogenic climate change." *Id.* at 11 n.8 (*citing* CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1)). This convoluted new gloss on "air pollutant," which dismisses with the concept of "air pollution agent" altogether for some substances, is only necessitated by Petitioners' overbroad interpretation of "air pollutant" as encompassing anything emitted into the ambient air.

[8] *Union Electric Co. v. EPA*, 427 U.S. 246, 249 (1976) (calling the ambient air quality standards program the "heart" of the CAA).

[9] *See also, e.g.*, CAA section 108(a)(2), 42 U.S.C. § 7408(a)(2) ("Air quality criteria for an air pollutant" must describe all the effects on public health or welfare "which may be expected from the presence of such pollutant in the ambient air, in varying quantities . . . "); CAA section 109(b)(2), 42 U.S.C. § 7409(b)(2) (ambient air quality standards

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"that portion of the atmosphere, external to buildings, to which the general public has access," 40 C.F.R. § 50.1(e), and it "is the statute's term for the outdoor air used by the general public." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 65 (1975).[10]

But the potential adverse effects of greenhouse gas emissions on global climate that Petitioners are concerned about are not from the presence of greenhouse gases in the ambient air, the air we breathe. Rather, it is the overall concentration of those gases in the world's atmosphere as a whole – which is believed to be fairly consistent globally and "well mixed throughout the atmosphere, up to approximately the lower stratosphere" – that many are concerned may be causing global climate change by trapping radiant heat and preventing radiant cooling. Pet. App. A-72 – A-73. EPA's determination that regulation of

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must "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air"); CAA section 111(a)(7)(B), 42 U.S.C. § 7411(a)(7)(B) (discussing measures to reduce pollution from new sources "before such pollution is emitted into the ambient air").

[10] Because the Act's National Ambient Air Quality Standards provisions by definition address the quality of "national," not international, ambient air, and because those provisions cover only "States" (defined to include only United States territory, CAA sections 107, 302(d), 42 U.S.C. §§ 7407, 7602(d)), the "ambient air" addressed by these provisions is that limited portion of the total global atmosphere that is within our national borders and that people breathe. (*See also* the congressional declaration of the purposes of the CAA, which include protecting "the Nation's air resources" and encouraging state, local, and regional air pollution prevention and control programs. CAA §101(b), 42 U.S.C. § 7401(b).) Thus, sections 108 and 109 of the Act authorize regulation to address adverse effects on public health and welfare that result from the presence of a listed air pollutant in the quantities in which it exists in the United States' ambient-air portion of the total global atmosphere.

greenhouse gas emissions for purposes of mitigating global climate change is not authorized by the Clean Air Act is consistent with the phrase "which is emitted into or otherwise enters the ambient air" in the definition of "air pollutant"; Petitioners' interpretation is not. *Compare* Pet. App. A-72 – A-74 and Jt. App. 128-130, 135 *with* Pet. Br. 12-15.

Petitioners' reading of the definition of "air pollutant" also is inconsistent with the second sentence of that definition, added in the Clean Air Act Amendments of 1990: "Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used." CAA section 302(g), 42 U.S.C. § 7602(g) (sentence added by section 108(j)(2) of Pub. L. 101-549, 104 Stat. 2468). If *any* substance that is emitted into or otherwise enters the ambient air is an "air pollutant" under the first sentence of the definition in CAA section 302(g), as Petitioners assert (*see* Pet. Br. at 13-14), then it would be unnecessary to have a second sentence stating that "any precursors to the formation of any air pollutant" are "air pollutants" themselves. Moreover, it would make no sense to say that such precursors are "air pollutants" only to the extent identified by the Administrator of EPA "for the particular purpose for which the term 'air pollutant' is used," if, as Petitioners assert, all substances emitted into the ambient air are "air pollutants," without any consideration of their effect in the air. Thus, Petitioners' interpretation of the definition of "air pollutant" not only fails to give meaning to every word of the definition, by ignoring "air pollution agent or combination of agents" and "ambient air," it ignores an entire sentence of the definition. *Cf. United States v. Nordic*

Village, Inc., 503 U.S. 30, 36 (1992) (courts must construe a statute, so far as possible, to give effect to every word). Far from being a reasonable – let alone the only reasonable – interpretation of that definition, it does not even conform to basic principles of statutory interpretation.[11]

Finally, Petitioners claim that their interpretation of EPA's Clean Air Act authority is compelled by the inclusion of the words "weather" and "climate" in the definition of "effects on welfare" in CAA section 302(h), 42 U.S.C. § 7602(h). Pet. Br. at 15. But that provision does not define "air pollutants" or "air pollution," nor does it expand those terms; it merely lists effects on welfare that should be

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[11] *See Chevron*, 467 U.S. at 843 n.9 (in deciding whether Congress directly addressed a particular issue (step 1), courts may use "the traditional tools of statutory construction"). Petitioners also describe the definition of "air pollutant" as if it were worded differently than it is, referring to that definition as including "physical and chemical matter" emitted into the ambient air (Pet Br. at 12 (emphasis omitted)). But in fact, the statute says "chemical, physical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). There is no "or," nor any other conjunction, in the series "chemical, physical, biological, radioactive . . . substance." Nor is there a comma after "matter." Grammatically, then, one could interpret the definition as including (1) any chemical, physical, biological, and/or radioactive substance, or (2) matter which is emitted into the ambient air. CO_2 Litigation Group does not suggest that is what Congress intended, but only that the fact that Petitioners must supply words and punctuation not in the statute to make the definition grammatical is a strong indication that the language of the statute does not unambiguously mandate the regulation of greenhouse gas emissions as Petitioners claim. Similarly, since "chemical" substances are also "physical" ones, as are "biological" and "radioactive" substances, and "radioactive" substances are "chemical" ones as well, the language of the definition of "air pollutant" might equally well be described as redundant as clearly "bespeak[ing] breadth." *Cf.* Pet. Br. at 12-13.

taken into account when regulating an air pollutant. Moreover, the dictionary definition of "climate" is "the general weather conditions usually found *in a particular place*," Cambridge Dictionary of the American Language (emphasis added), or "the meteorological conditions, including temperature, precipitation, and wind, that characteristically prevail *in a particular region*," American Heritage Dictionary of the English Language, Fourth Edition (2000) (emphasis added). There is nothing to suggest that Congress, over 35 years ago, intended instead to mean "global climate."[12]

II. EPA's Interpretation of Its Limited CAA Authority To Address Global Climate Change Is Reasonable and Consistent with the Remainder of the Statute

One of the traditional tools of statutory construction that EPA applied in assessing whether the definitions section of the Clean Air Act give it authority to regulate emissions of greenhouse gases for purposes of mitigating global climate change was to look to the text and structure of the remainder of the statute, and in particular to whether such an interpretation of the definitions would be

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[12] Additionally, Petitioners' all-encompassing interpretation of "air pollutant" is particularly problematic regarding effects on "weather." Many types of "matter" as well as non-physical "phenomena" that "enter the ambient air" affect weather, such as wind, humidity, and static electricity. Under the interpretation of the definitions of "air pollutant" and "welfare" advocated by Petitioners, EPA would have authority to regulate these natural materials and phenomena that affect weather as "air pollutants" (and, under Petitioners' reasoning, if those materials or phenomena could reasonably be anticipated to endanger public health or welfare, EPA would be required to regulate them). *Cf.* Pet. Br. at 13-15, 35-38.

reasonable in light of the types of measures to address air pollution that EPA is authorized to take under the Clean Air Act. Pet. App. at A-72 – A-75; *cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (looking to whether an interpretation of statutory terms would lead to futile or absurd results when applied to the remainder of the statute, regardless of how clear the words may be on "superficial examination"). The principle that words of a statute must be interpreted in light of the remainder of the statute, "while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (quotations and citations omitted).[13]

As EPA correctly noted, its regulatory authorities under the Clean Air Act were not designed with mitigation of global climate change in mind, and many of them would be inappropriate and ineffective for that purpose. Pet. App. at A-72 – A-74. If EPA and states were forced to regulate greenhouse gas emissions using those regulatory

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[13] *See also Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.").

authorities, the result would be inefficient control measures with huge costs and economic dislocations.

A. Incompatibility Between Global Climate Change and Clean Air Act Regulatory Programs

As explained above, the most far-reaching aspect of the CAA regulatory scheme is the establishment and implementation of National Ambient Air Quality Standards ("NAAQS").[14] (That regulatory scheme was addressed by the Court most recently in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001); *see also Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975).)

The necessary first step in – and the trigger for – the process of establishing NAAQS for an air pollutant is placing it on a list of air pollutants established under CAA section 108(a)(1), 42 U.S.C. § 7408(a)(1). That section requires the Administrator of EPA to publish a list that includes each air pollutant:

> (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;[15]

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[14] *Union Electric*, 427 U.S. at 249; *see also* CAA § 202(i)(2)(A), 42 U.S.C. § 7521(i)(2)(A) (directing EPA to examine the need for further motor vehicle emission reductions "to attain or maintain" NAAQS).

[15] As discussed at p. 28, *infra*, this language is identical to the language describing the judgment the Administrator must make to set emission standards for motor vehicles under CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1).

> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
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> (C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

Id. Within twelve months after including such an air pollutant on this list, EPA must issue air quality criteria for the air pollutant which "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant *in the ambient air.*" CAA § 108(a)(2), 42 U.S.C.§ 7408(a)(2) (emphasis added). For this reason, pollutants included on the section 108(a)(1) list are referred to as "criteria pollutants."

At the same time that it issues air quality criteria for a newly listed criteria pollutant, EPA must also promulgate NAAQS for the pollutant under section 109 of the CAA, 42 U.S.C. § 7409. Primary NAAQS establish concentrations of a criteria pollutant that must be attained and maintained in the ambient air in order to protect the public health, based on the criteria established under section 108(a)(1) for the pollutant and allowing an adequate margin of safety. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1).

Establishment of NAAQS in turn sets in motion an enormously complex and extensive regulatory process. Under the Act's provisions for implementing NAAQS, each State has "the primary responsibility" for attaining and maintaining the NAAQS within its borders. CAA § 107(a),

42 U.S.C. § 7407(a); *see id.* § 110, 42 U.S.C. § 7410 (setting out requirements for State plans to implement the NAAQS); *id.* § 101(a)(3), 42 U.S.C. § 7401(a)(3), (stating Congress' finding that "air pollution control at its source is the primary responsibility of States and local governments"). The Act provides that each State, subject to EPA review and approval, is to designate as a "nonattainment" area any area within that State "that does not meet (or that contributes to ambient air quality in a nearby area that does not meet)" the NAAQS. CAA § 107(d)(1)(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i). Other areas are designated "attainment" if they meet the NAAQS or "unclassifiable" if information is unavailable to classify them as meeting or not meeting it. Under the Act, each State fulfills its "statutory role as [the] primary implementer[] of the NAAQS"[16] within that State through an implementation plan (called a State implementation plan or "SIP") that "specif[ies] the manner in which national . . . ambient air quality standards will be achieved and maintained within . . . such State." CAA § 107(a), 42 U.S.C. § 7407(a).

In other words, the statutory scheme assigns to each State the primary role in implementing any NAAQS by adopting and enforcing emission control measures to limit the presence of criteria air pollutants in the ambient air within its borders to levels necessary to attain and maintain the air quality levels set by the NAAQS.[17] The statute

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[16] *Whitman*, 531 U.S. at 470 (emphasis omitted) (*citing* CAA §§ 107(a), 110, 42 U.S.C. §§ 7407(a), 7410).

[17] If a State fails to develop and submit a SIP in a timely way, the Administrator must promulgate a "Federal implementation plan" or "FIP," which takes the place of the SIP in that State. CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).

also contains mandatory sanctions for states that fail to submit or implement adequate SIPs, including a possible prohibition on issuance of federal highway funding to the state and a requirement that emissions from all new and modified major sources be offset by a reduction of emissions at existing sources at least twice as large. CAA §§ 110(m), 179(b), 42 U.S.C. §§ 7410(m), 7509(b).

In addition to imposing controls on existing sources through SIPs or FIPs, state and EPA regulatory authorities also are directed to impose requirements on the construction of new major sources of air pollution and the modification of existing major sources. CAA §§ 160-169, 42 U.S.C. §§ 7470-7479 (Prevention of Significant Deterioration ("PSD") requirements for areas attaining NAAQS); and CAA section 173, 42 U.S.C. § 7503 (new source review ("NSR") requirements for areas not attaining NAAQS). Among other things, these preconstruction permitting programs required by the Act mandate that new or modified sources utilize the Best Available Control Technology (in attainment areas), CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3), or meet even more stringent Lowest Achievable Emission Rates (in non-attainment areas), CAA §§ 171(3), 173(a)(2), 42 U.S.C. §§ 7501(3), 7503(a)(2). In areas that have been designated as not attaining the NAAQS, new or modified sources also must provide "emission offsets" -- reductions in pre-existing emissions of the pollutant that would more than offset the increased emissions of the pollutant from the new or modified source. CAA § 173(a)(1)(A) and (c), 42 U.S.C. § 7503(a)(1)(A), (c).

The Clean Air Act also requires EPA to establish standards of performance for new or modified stationary sources of any air pollutant, not just those criteria pollutants covered by NAAQS. CAA § 111(a)(3) (definition of

stationary source), § 111(b) (standards for categories of sources), 42 U.S.C. §§ 7411(a)(3), (b). EPA must prepare a list of categories of stationary sources of air pollutants, including any category of sources which, in the Administrator's judgment, "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A). EPA is then required to promulgate new source performance standards ("NSPS") for each such category of sources, requiring that emissions of air pollutants reflect the performance of the best demonstrated system of emission reduction. CAA §§ 111(a)(1) and (7), 42 U.S.C. §§ 7411(a)(1) and (7). If the pollutant regulated is not subject to a NAAQS, then the statute also requires states to develop programs to control existing sources in the same source categories for which NSPS have been promulgated. CAA § 111(d), 42 U.S.C. § 7411(d).

None of these regulatory authorities makes sense if the "air pollutant" to which they are applied is CO_2 or another greenhouse gas being regulated for the purpose of mitigating potential global climate change. Since the projected effect of greenhouse gas emissions on climate change is a function of changes in the global atmosphere, rather than local or regional air quality, and it is the aggregate contribution of all greenhouse gas emissions around the world to global atmospheric greenhouse gas concentrations that is believed by many to cause global climate change, notions of attaining or not attaining an ambient air quality standard within a state or air quality control region are inapplicable. *See* Pet. App. at A-72 – A-74. If, as Petitioners seek, the Clean Air Act were used to reduce atmospheric loadings of greenhouse gases from sources in the United States (or, to put it another way, if

Petitioners are correct that current atmospheric concentrations of greenhouse gases are higher than the concentration needed "in order to protect the public health," CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1)), then the entire country would be a nonattainment area for any greenhouse gas NAAQS. Distinctions in the statute between attainment and nonattainment areas would be meaningless. More importantly, because atmospheric concentrations of greenhouse gases would be outside the control of any individual source or any individual state, no state, regardless of how stringent its State Implementation Plan was, could demonstrate attainment of the NAAQS. *See* Jt. App. 130. Thus, sanctions for nonattainment of such a standard would be unavoidable for all states, a result that Congress could not have intended.

In any event, EPA would have no rational basis for establishing NAAQS for CO_2, i.e., a local, ambient concentration of CO_2 that could be determined to be "requisite to protect the public health" with "an adequate margin of safety," CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). That is because: (1) no attempt to meet a particular concentration of CO_2 in a state's ambient air could be shown to protect public health from a global phenomenon believed to be a function of the average concentration of greenhouse gases in the global atmosphere and of worldwide loadings of greenhouse gases and (2) in any case there is no agreement on what concentration of CO_2 in the global atmosphere (in combination with other greenhouse gases) is sufficiently protective or optimal for the global climate. *See* Jt. App. 161, 202-205 (describing uncertainties and value judgments affecting the ability to set a "safe" level for greenhouse gas concentrations in the ambient air). "The differences among climate model projections are

sufficiently large to limit the ability to define an 'acceptable concentration' of atmospheric greenhouse gases." *Id.* at 204; *see also* Pet. App. A-73 (complexities of global climate "would present scientific issues of unprecedented complexity in the NAAQS context"). Thus, the concept of a NAAQS, established by Congress as the centerpiece of Clean Air Act regulation, just does not fit CO_2 and other greenhouse gases. *Cf. Union Electric*, 427 U.S. at 249.

Nor would the Clean Air Act provisions requiring new or modified sources to reduce emissions to the greatest degree achievable and to obtain emission offsets have any apparent public policy justification with respect to CO_2, given that CO_2 is not, in and of itself, a harmful substance when emitted into or residing in the ambient air, but in fact constitutes an important constituent of the atmosphere that plays an essential role in life on Earth.[18] Unlike existing criteria air pollutants, which are agents of pollution according to the common meaning of "pollution" (making the air contaminated or impure) and for which further reduction of emissions and ambient concentrations

[18] There are also numerous other provisions of the CAA that would be inappropriate or meaningless if applied to greenhouse gases to address global climate change. *See, e.g.*, CAA § 165(a)(7), 42 U.S.C. § 7475(a)(7) (requiring new facilities emitting major amounts of air pollutants (*see* CAA § 169(1), 42 U.S.C. § 7479(1)) to monitor their emissions' effects "on air quality in any area which may be affected by [those] emissions" – which, in the case of greenhouse gases, would be the entire world); CAA § 123, 42 U.S.C. § 7423 (allowing a source's air pollutant emission limitations to be relaxed to some extent due to the height of its stack, which affects ambient air concentrations downwind of the stack, but not concentrations in the global atmosphere).

always has at least some theoretical benefit, reducing greenhouse gas emissions will not always be beneficial.[19]

In evaluating whether the Clean Air Act authorizes regulation of greenhouse gas emissions for climate change mitigation purposes, EPA looked at these disconnects between the regulatory systems Congress had established and the nature of global climate change and the potential role of greenhouse gas emissions, concluding that Congress could not have intended such ineffective and inappropriate regulatory mechanisms to be applied to greenhouse gas emissions. Pet. App. A-72 – A-74; Jt. App. 128-30. In light of the incompatibility of the remainder of the statute with Petitioners' interpretation of the definition of "air pollutant," EPA's determination not to regulate greenhouse gas emissions under the Clean Air Act was consistent with this Court's guidance on statutory interpretation and is entitled to deference. *See, e.g.*, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible."); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 204 (1978) ("[Frequently] words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd

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[19] Also, similar to the Clean Air Act program for reducing acid deposition over the northeastern United States, requiring some sources to reduce their greenhouse gas emissions to the greatest extent possible (which might be appropriate if the goal were to minimize the impact of the individual source on the ambient air) would almost certainly not be an economically efficient way to achieve a desired reduction in average greenhouse gas concentrations in the global atmosphere. *See* pp. 31-32, *infra*.

results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.") (Powell, J., dissenting) (internal quotes and citation omitted).

B. The Adverse Economic and Political Consequences of Forcing Global Climate Change into the Clean Air Act Regulatory Framework Would Be Enormous.

If Petitioners' succeed in their view that the Clean Air Act definition of "air pollutant" is broad enough to encompass regulation of greenhouse gas emissions for purposes of mitigating global climate change, then it is highly probable, at least as Petitioners see it, that all of the foregoing Clean Air Act regulatory authorities would be triggered, no matter how inappropriate or ineffective they might be. Because generation of CO_2 is an unavoidable result of the combustion of fossil fuels, relied on for transportation and electric power generation by the vast majority of American businesses and individuals, attempts to apply the Clean Air Act authorities to greenhouse gas emissions would place an extraordinary burden on federal and state regulators, regulated businesses, and the economy and public as a whole. That burden is heightened by the fact that, at present, unlike most pollutants regulated under the Clean Air Act, technologies are not currently available to remove CO_2 from the emissions from fossil fuel combustion. Pet. App. A-76 – A-78, A-87.

Since it is hard to imagine how NAAQS and SIP requirements and other regulatory provisions of the Act would be applied to greenhouse gases, it is impossible to

project exactly how great this burden would be, but it would undoubtedly be huge.[20] (*Amicus Curiae* Calpine Corporation, supporting Petitioners, offered a projection by the private National Commission on Energy Policy that – even if all of the aggressive and innovative measures recommended by that group were implemented and were successful – the cost of reducing greenhouse gas emissions would be $42 billion in 2020. Calpine Brief at 8.) Yet even with the huge cost and economic dislocation involved in reducing emissions that currently are essential to our way of life, there is no certainty that any level of greenhouse gas emission reductions in the United States would prevent adverse effects from global climate change, especially given the growing contribution to global atmospheric loadings from other countries. Pet. App. A-83 – A-86. In its decision denying the petition to regulate greenhouse gas emissions from motor vehicles, EPA correctly observed that this is an area where EPA must be cautious about "using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues. . . . " Pet. App. A-68, A-76, *citing Brown & Williamson*, 529 U.S. 120.

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[20] For example, EPA's report to Congress under section 812 of the Clean Air Act Amendments of 1990, *The Benefits and Costs of the Clean Air Act, 1970 to 1990*, Oct. 1997, identified capital expenditures and operating expenses that stationary sources incurred during the first 20 years of the Clean Air Act. Since most of the requirements and expenditures for existing sources to comply with the CAA stem from SIPs (which in turn implement NAAQS), these cost estimates give a sense of the impact the existing NAAQS have had on businesses and the economy. EPA estimates that capital expenditures for stationary sources in the 1980s were $4-5 billion each year, and operating and maintenance expenditures each year were between $5 and 9 billion. *Id.* at A-10. Not surprisingly, EPA found that these costs have resulted in increased prices of goods and decreased demand. *Id.* at A-24-25.

Petitioners claim that a favorable resolution of the issues they present in this case "will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the question whether such pollutants are endangering public health or welfare." Pet. Br. at 3. They also assert that the decision they are seeking from the EPA, that greenhouse gas emissions constitute air pollutants emitted by motor vehicles which may reasonably be anticipated to endanger public health or welfare, under CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1), is entirely separate from and has nothing to do with the regulation of air pollutant emissions from stationary sources under the NAAQS provisions and other stationary-source requirements of the Clean Air Act. Pet. Br. at 27-29.

These arguments are disingenuous at best. The question Petitioners present here – whether EPA has authority to regulate greenhouse gases associated with climate change under CAA section 202(a)(1), 42 U.S.C. § 7521(a)(1) – can be answered in the affirmative only if (1) greenhouse gases, as they may affect global climate change, are "air pollutants" as defined in CAA section 302(g) (a definition that applies to both mobile source and stationary source provisions of the Act); and (2) the Administrator, in his judgment, determines that emissions of greenhouse gases from motor vehicles cause or contribute to air pollution "which may reasonably be anticipated to endanger public health or welfare." CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1). As to (1), Petitioners claim that an affirmative answer is straightforward and unavoidable. Pet. Br. at 8, 12-15. As to (2), Petitioners asserted in their petition for writ of *certiorari* that global climate change is "the most pressing environmental challenge of our time"

(Petition at 22), that there "can be no reasonable debate about the exceptional importance of the problem of climate change" (*id.* at 23), that the "scientific basis for concern is well documented in the administrative record, including through various official government reports" (*id.* at 23 n.10), that "air pollutants associated with climate change are accumulating in the atmosphere at an alarming rate" such that "the window of opportunity in which we can mitigate the dangers posed by climate change is rapidly closing" (*id.* at 25), that "a delay in implementing emission reductions will result in increased extent and magnitude of adverse impacts" (*id.*), and so forth. It is clear that Petitioners believe that, if they succeed in convincing the Court to order EPA to evaluate greenhouse gases as "air pollutants" under section 202(a) of the Clean Air Act, an "endangerment finding," compelling regulation of new motor vehicle emissions of greenhouse gases, will be unavoidable.[21]

Likewise, Petitioners' actions make it perfectly clear that at least many of the Petitioners believe that succeeding in the instant case would force EPA to apply the stationary source provisions of Title I of the Clean Air Act to non-vehicular greenhouse gas emissions, for purposes of attempting to mitigate global climate change. As explained

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[21] Some of the *amici curiae* supporting Petitioners are even more forthcoming on this point. *See, e.g.*, Brief of *Amicus Curiae* State of Delaware at 23 ("it is obvious that there are severe actual and imminent dangers attributed to global climate change. . . . EPA has a duty to regulate such emissions."); Brief of *Amici Curiae* Climate Scientists . . . at 27 (evidence supporting an endangerment determination is "sufficient" and "compelling"); Brief of *Amici Curiae* U.S. Conference of Mayors at 28 n.49 ("the science of global warming points to only one answer to [the endangerment] question").

above, the trigger for development of the ambient air quality standards for a substance, which are then implemented through the elaborate NAAQS program, is that the substance be an "air pollutant" the emissions of which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. . . . " CAA § 108(a)(1)(A). This statutorily required finding for development of NAAQS is virtually identical to the endangerment finding for mobile sources under CAA § 202(a)(1) that Petitioners clearly see as inevitable.[22]

Petitioners argue that EPA should not have considered the infeasibility of using the Clean Air Act's stationary source regulatory provisions to control greenhouse gas emissions for global climate change purposes in assessing whether the Act authorizes EPA regulation of greenhouse gases from motor vehicles, because, Petitioners claim, the issues in the instant case are unrelated to potential regulation of greenhouse gas emissions from stationary sources. Pet. Br. 9, 28-29. This is particularly surprising, given the past and pending actions of some of the Petitioners. In 2003, Massachusetts, Maine, and Connecticut filed suit against EPA in U.S. District Court for the District of Connecticut, seeking an order concluding that EPA already had made findings about the risks of global climate change sufficient to create a mandatory duty for EPA to list CO_2 as a criteria pollutant under CAA section 108, triggering an obligation to promulgate NAAQS for CO_2.

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[22] *Accord*, Brief of *Amicus Curiae* Calpine Corporation at 2 ("the language of § 202(a)(1), 42 U.S.C. § 7521(a)(1), that triggers the process of regulating motor vehicle emissions is identical to language elsewhere in the CAA that initiates various processes for regulating emissions from industrial sources.").

Commonwealth of Massachusetts, et al. v. Horinko, D. Conn. No. 3:03CV984(PCD). A portion of that complaint is included in the Appendix to this brief as Appendix A, p. App. 1.

When EPA issued its denial of the petition for rulemaking that is the subject of the instant case, the three states dismissed their District of Connecticut case without prejudice, concluding that "the scope of EPA's authority" "to regulate greenhouse gases" "is now better presented to the D.C. Circuit." *See* Appendix B, pp. App. 11-12. The three states told the District Court that they "intend to refile this case upon a decision by the D.C. Circuit rejecting EPA's position that it lacks authority to regulate greenhouse gases (or a decision declining to reach the issue)." *Id.* (These three states have not yet re-filed their complaint, presumably because this appeal of the D.C. Circuit's decision is pending.)

Similarly, earlier this year, 12 of the Petitioner states and municipalities in the instant case filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA's promulgation of revised New Source Performance Standards under CAA § 111, 42 U.S.C. § 7411, for electric utility, industrial, and commercial boilers ("boiler NSPS").[23] D.C. Cir. No. 06-1148, consolidated with other petitions as *Coke Oven Environmental Task Force v. U.S. EPA*, No. 06-1131 (and consolidated cases). The states and municipalities filed a statement of issues to be raised that listed, as one of their two issues: "Does the United States Environmental Protection Agency (EPA) have the authority to regulate

[23] 71 Fed. Reg. 9865 (Feb. 27, 2006).

emissions of carbon dioxide from stationary sources under section 111 of the Clean Air Act, 42 U.S.C. § 7411, based on the effect of carbon dioxide on public health or welfare, which encompasses, among other things, impacts on climate and weather?" *See* Appendix C, p. App. 15. (Environmental advocacy groups, including a number of the Petitioners, filed a similar petition for review of the boiler NSPS and a similar statement of issues. D.C. Circuit Case. No. 06-1149; *see also* Appendix D, pp. App. 20-23.) In fact, numerous parties who commented on the proposed boiler NSPS, including a number of the Petitioners, argued that the current knowledge of global climate change warrants a conclusion that emissions of CO_2 and other greenhouse gases from boilers "are reasonably anticipated to endanger public health and welfare," and therefore they must be subject to emission limitations in the boiler NSPS. *See* 71 Fed. Reg. at 9869.

The parties to that litigation have since jointly asked the D.C. Circuit to sever and hold in abeyance the portion of the petitions for review claiming that EPA should have published new source performance standards for greenhouse gas emissions, because the question presented in the case before this Court "regarding whether EPA has the legal authority to regulate . . . greenhouse gases under the Clean Air Act may be dispositive of some or all of the carbon dioxide and other greenhouse gas issue [*sic*] raised by State and Environmental Group Petitioners in these consolidated cases." Appendix D, p. App. 23.

In short, many of the Petitioners have taken actions that explicitly recognize the connection between a determination of EPA's authority and duties with respect to greenhouse gas emissions from motor vehicles and EPA's regulation of greenhouse gas emissions from stationary

sources. Petitioners' suggestion that there is no legal connection between the two should be rejected, and the Court should find that it was reasonable for EPA, in interpreting its authority under the Clean Air Act, to consider whether regulation of greenhouse gas emissions for purposes of mitigating global climate change makes sense when applied to the regulatory authorities for both mobile sources and stationary sources contained in the Clean Air Act.

III. Congress Has Yet To Enact the Regulatory Program Petitioners Ask this Court To Find.

In addition to looking at the entire Clean Air Act and considering the incompatibility of the regulatory authorities that Congress laid out for air pollutants in the Act with the purpose of reducing global atmospheric loadings of greenhouse gases, EPA also reasonably considered those actions that Congress *had* taken with respect to climate change and other similar issues. Pet. App. A-70 – A-75. When faced with a different type of environmental concern, depletion of the stratospheric ozone layer by man-made chemicals, Congress added a whole new set of provisions to the Clean Air Act, first as a separate subtitle to Title I and later as an entirely new Title VI, rather than concluding that the other Clean Air Act regulatory authorities were sufficient. Pet. App. A-71 – A-72.

Similarly, when Congress addressed the growing concerns about "acid rain," the deposition of acidic compounds over a wide area of the northeastern United States from long-distance transport of air pollutants, Congress developed a whole new regulatory approach, enacted as Title IV of the Clean Air Act Amendments of 1990 (42

U.S.C. ch. 85 subch. IV-A). Since the acid rain problem was the result of total acid deposition rather than the specific impacts of a particular emission source, Congress addressed it through an emissions cap and emissions trading system that would, in contrast to pre-existing Title I regulatory authorities, allow for the reduction of total acid deposition from numerous emission sources to be achieved economically by controlling the most easily controlled sources. *See* CAA §§ 401, 403-405, 42 U.S.C. §§ 7651, 7651b-7651d; *see also* H.R. Rep. 101-490, pt. 1, at 356, *A Legis. Hist. of the CAA Amendments of 1990*, S. Prt. No. 103-38, at 3021, 3388 (1993) ("1990 Legis. Hist."). These specific congressional responses to different types of national or global atmospheric problems contrast starkly with Petitioners' claim that an even broader new climate change program should be inferred from the definitions section of the Act.[24]

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[24] An *amicus curiae* brief filed by four former Administrators of EPA makes the point that EPA traditionally has interpreted its Clean Air Act authorities broadly to give it the flexibility to address emerging air pollution problems. The examples that brief provides, however, involve situations where Congress enacted specific provisions to deal with the new problem, *e.g.*, the provisions regulating ozone-depleting substances, *id.* at 21-22, or situations where, although the particular pollutant was not specifically identified by Congress as a concern, the Clean Air Act already contained regulatory provisions that could be used to address the emerging problem effectively, *e.g.*, using existing authority to regulate fuel additives to act quickly to reduce exposure to airborne lead from leaded gasoline, *id.* at 10, or using the NAAQS process to regulate ambient concentrations of a subset of particulate matter believed to present a greater hazard to human health, *id.* at 24. None of these examples involved forcing a whole new type of issue not previously envisioned by Congress (such as depletion of the stratospheric ozone layer . . . or global climate change) into existing Clean Air Act regulatory authorities that did not provide an effective means for addressing that issue. *Cf.* H.R. Rep. 101-490, pt. 1, at 167, 1990 Legis.

(Continued on following page)

Looking at the entire statute consistent with traditional tools of statutory interpretation also meant considering the fact that the only places in the Clean Air Act (and other statutes that deal with related topics and should be construed *in pari materia*) where Congress specifically addressed global climate change was in provisions seeking additional research and data, and encouraging development of new technologies and policies, rather than imposing any restrictions on emissions or similar regulatory provisions. Pet. App. A-74 – A-76. In the years leading up to its consideration of major amendments to the Clean Air Act in 1990, Congress enacted several statutes providing for research into global climate change concerns associated with emissions of CO_2 and other substances. None of these statutes authorized regulation of CO_2 emissions.[25]

Hist. at 3181 (describing the need for the acid deposition provisions of CAA Title IV: "The Clean Air Act was originally designed mainly to reduce high pollution levels that tend to occur near major pollution sources. It did not contemplate that long-distance transport of air pollutants could cause widespread adverse impacts."); *see also id.* at 159, 1990 Legis. Hist. at 3168 (explaining need for amendments in part because "a number of serious new air pollution problems have emerged that were not anticipated by the Clean Air Act Amendments of 1977.").

[25] *See, e.g.*, the 1978 National Climate Program Act, 15 U.S.C. § 2901, *et seq.*, whose purpose was "to establish a national climate program" to help "understand and respond to natural and man-induced climate processes and their implications"; Title VII of the Energy Security Act of 1980, which included provisions (42 U.S.C. §§ 8911-8912) authorizing "a comprehensive study of the projected impact, on the level of CO_2 in the atmosphere, of fossil fuel combustion, coal conversion and related synthetic fuels activities authorized in this Act, and other sources"; the Global Climate Protection Act of 1987, 15 U.S.C. § 2901 note (providing for the formulation of U.S. global climate change policy by the President to be proposed to Congress).

In considering what became the 1990 CAA Amendments, Congress considered but did not adopt proposed amendments that would have mandated control of CO_2 emissions and other substances associated with concerns about global climate change. For example, during floor debate on S.1630, the Environment and Public Works Committee's 1990 CAA Amendments bill, the Senate dropped a provision that would have required automotive CO_2 emission limits. *See* S.1630, 103d Cong. § 206 (1989), 1990 Legis. Hist. at 8036-38 (proposing a new CAA § 216 "Emissions of Carbon Dioxide from Vehicles"), deleted in a substitute amendment to S.1630, *see* 1990 Legis. Hist. at 5178, 7248; *see also* S. Rep. 101-238 at 98-100, 1990 Legis. Hist. 8338 at 8438-40.[26]

The Senate committee's reported bill also contained other provisions to regulate CO_2 to address concerns about global climate change. The Senate committee's bill, S.1630, would have authorized EPA to list and regulate "manufactured substances which are known or may reasonably be anticipated to cause or contribute significantly to atmospheric or climatic modification, including stratospheric ozone depletion." *Id.* at 685, 1990 Legis. Hist. 8338 at 9025 (proposing to add a new section 504(b) to the Act). While providing for regulations directed at depletion of ozone in

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[26] *See* Pet. App. A-69 – A-70. Petitioners attempt to dismiss these facts by citing case law noting that a failed legislative proposal could, among other things, have resulted from the fact that existing legislation was believed to already address the issue. Pet. Br. at 21. In this case, however, there are explicit indications to the contrary. For example, Senator Chafee, the proposal's main sponsor, reported "a compromise" in which he "gave up" the CO_2 emission limits in section 216 of S.1630. 1990 Legis. Hist. 5189-90. *See also* Brief of Respondent Utility Air Regulatory Group.

the stratosphere, that version of the bill also directed EPA to designate "the global warming potential" of each listed substance. *Id.* at 686, 1990 Legis. Hist. 8338 at 9026 (proposing to add a new section 504(c) to the Act).

The Senate also considered amending the Clean Air Act to require EPA to list and designate the global warming potential of products, and to consider regulating the use of products based on their global warming potential, in addition to their potential impact on stratospheric ozone depletion. *Id.* pp. 685-686, 1990 Legis. Hist. at 9025-26. In the end, though, the Clean Air Act Amendments of 1990 only authorized listing and regulation of substances with respect to "harmful effects on the stratospheric ozone level." CAA § 602(a), (b), 42 U.S.C. § 7671a(a), (b). Although section 602(e) of the Act as amended directs EPA to publish, after notice and opportunity for public comment, the "global warming potential" of each listed substance, that section also contains a sentence (which was absent from the Senate committee's bill) stating that "[t]he preceding sentence [requiring publication of listed substances' global warming potential] shall not be construed to be the basis of any additional regulation under this Act." CAA § 602(e), 42 U.S.C. § 7671a(e).

The 1990 Clean Air Act Amendments also added language to the Act directing EPA to conduct a "nonregulatory" program for addressing CO_2 and certain other substances. Section 103(g) of the Act directs EPA to "conduct a basic engineering research and technology program to develop, evaluate, and demonstrate nonregulatory strategies and technologies for air pollution prevention." CAA § 103(g), 42 U.S.C. § 7403(g). This nonregulatory program is to include improvements in "nonregulatory strategies and technologies for preventing or reducing" emissions

"from stationary sources, including fossil fuel power plants." CAA § 103(g)(1), 42 U.S.C. § 7403(g)(1). Section 103(g) provides that "[n]othing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." 42 U.S.C. § 7403(g).

Thus, Congress in 1990 considered amending the Act to include provisions authorizing regulatory control of CO_2 emissions from certain sources but chose not to enact any such provisions. Rather, Congress enacted language in sections 602(e) and 103(g) of the Act reflecting a legislative decision not to authorize CO_2 emission controls and indicating a belief that further information was needed before legislating a new control regime.

Likewise, after the 1990 amendments to the CAA, Congress enacted several *non-regulatory* laws related to global climate change. The day after enactment of the Clean Air Act Amendments of 1990, Congress passed the Global Change Research Act of 1990, 15 U.S.C. § 2921, *et seq.*, which established a research program and included a finding that: "Development of effective policies to abate, mitigate, and cope with global change will rely on greatly improved scientific understanding of global environmental processes and on our ability to distinguish human-induced from natural global change." *Id.* § 2931(a)(4).[27] Title XVI of the Energy Policy Act of 1992, Pub. L. No. 102-486,

[27] A few days later, Congress enacted the Global Climate Change Prevention Act of 1990, 7 U.S.C. § 6701, *et seq.*, which provided for research on the impact of global climate change on agriculture and required a report to Congress providing "recommendations for actions which may be taken to mitigate the negative effects of global climate change. . . ." *Id.* at § 6702(c).

directed the Executive Branch to develop a plan "to achieve to the maximum extent practicable and at least-cost to the Nation ... the stabilization and eventual reduction in the generation of greenhouse gases." 42 U.S.C. §§ 13382(a), (g). It did not contain any provisions for imposing limitations on emissions, however.[28] This statute was intended to provide Congress with an assessment of "the important technical and policy issues that will enable us to make wiser decisions on more dramatic and possibly higher cost action which should be undertaken only in the context of concerted international action." H.R. Rep. 102-474, pt. 1, at 152 (1992), 1992 U.S.C.C.A.N. 1953, 1975.

Most recently, in the Energy Policy Act of 2005, Congress established a number of specific federal policies and programs to address global climate change, but again none of its provisions impose or authorize mandatory restrictions on emissions of greenhouse gases. Pub. L. No. 109-58, tit. XVI, §§ 1610(b)(1), (c)(1), 1611, 119 Stat. 595, 1109. In fact, in debating that act the Senate considered and rejected a proposed amendment (Amendment No. 826, introduced by Senators McCain and Liebermann) which would have imposed mandatory limits on emissions of greenhouse gases. *See* 151 Cong. Rec. S6878, S6892-96 (daily ed. June 21, 2005). That amendment was rejected on the floor by a 38-60 margin. Vote 148, *id.* at S7029 (daily ed. June 22, 2005).

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[28] *Cf.* section 1605(a) of the Energy Policy Act of 1992, 42 U.S.C. § 13385(a), which provides for a national aggregate inventory of each greenhouse gas, while stating that the subsection "does not provide any new data collection authority," and § 1605(b), 42 U.S.C. § 13385(b), which provides for voluntary reporting of CO_2 and other greenhouse gas emissions and reductions.

These congressional actions indicate that, far from relying on an extension of existing Clean Air Act regulatory programs for air pollutants to address concerns about global climate change, Congress instead has addressed global climate change in specific terms (although not as aggressively as Petitioners would like). These considerations support and confirm EPA's assessment that Congress did not intend, through a few words in the definition of "air pollutant" and "welfare," to authorize or compel EPA to adopt regulations addressing concerns about the global climate and the potentially wide-ranging measures that would be needed to mitigate greenhouse gas emissions. *See Brown & Williamson*, 529 U.S. at 133 ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (statutory provisions dealing with the same subject-matter normally are construed together to discern their meaning).

There is no indication that Congress expected EPA to address global climate change using an ill-matched set of regulatory programs intended to deal with local and regional impacts of air pollutant emissions on ambient air quality. EPA reasonably interpreted the definition of "air pollutant" in light of the history of congressional action on climate change. Pet. App. A-74 – A-76. Certainly nothing about the legislative history of the Clean Air Act and related enactments renders EPA's position "over the edge of reasonable interpretation." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001).

CONCLUSION

For the reasons set forth above, the Court should uphold EPA's interpretation of its duties and authorities under the Clean Air Act and EPA's expert judgment that regulation of greenhouse gas emissions from motor vehicles for purposes of mitigating global climate change is inappropriate at this time. While agreeing that climate change is an important issue that warrants serious government consideration, CO_2 Litigation Group urges the Court to decline Petitioners' invitation to legislate a global climate change mitigation program that Congress never intended and indeed is still debating.

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Appendix A Complaint in D. Conn. seeking order for EPA to list carbon dioxide as a "criteria" pollutant under section 108 of the Clean Air Act

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

COMMONWEALTH OF MASSACHUSETTS, STATE OF CONNECTICUT, and STATE OF MAINE, Plaintiffs, v. CHRISTINE TODD WHITMAN, in her capacity as ADMINISTRATOR of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	CIVIL ACTION NO. 3:03CV984 (PCD)

COMPLAINT

The Commonwealth of Massachusetts and the States of Connecticut and Maine (Plaintiff States), acting by and through their respective Attorneys General, bring this civil action and allege as follows:

DESCRIPTION OF THE CASE

1. The Clean Air Act requires the Administrator of the United States Environmental Protection Agency to regulate common air pollutants that, due to their presence in ambient air from emissions from numerous and varied sources, cause or contribute to air pollution that endangers

public health or welfare. Section 108 of the Act initiates the regulation of each such pollutant that, in the judgment of the Administrator, satisfies those criteria, by requiring her to include it in a "list."

2. Carbon dioxide, a "greenhouse gas" generated by the combustion of fossil fuels, is the dominant cause of global warming and is an "air pollutant" under the Act. In May 2002, the United States submitted to the United Nations a formal, comprehensive report that set forth, among other things, the official position of the United States on the likely impacts of global warming. The report concluded that global warming will likely produce wide-ranging and potentially devastating impacts to public health and welfare.

3. The EPA played the lead role among numerous federal agencies or departments, and the Executive Office of the President, in coordinating the preparation, review and approval of that report. Further, the EPA itself fully reviewed and officially adopted the report's findings regarding the likely impacts of global warming.

4. Notwithstanding having made a judgment that carbon dioxide causes or contributes to global warming that endangers public health and welfare, the Administrator has failed to perform her mandatory duty under Section 108 of the Act, namely to "list" carbon dioxide and, thereby, initiate its regulation under the Act. Rather, the Administrator supports implementation of "voluntary" greenhouse gas reductions and advocates using "other creative ways" to address the dangers posed by global warming.

5. The Administrator's failure to "list" carbon dioxide constitutes a failure to perform a nondiscretionary duty

and is a violation of the Act for which Plaintiff States are entitled to relief. In this action, the Plaintiff States seek an order compelling the Administrator to commence the regulatory process for carbon dioxide by adding it to the list of air pollutants established under Section 108.

JURISDICTION AND VENUE

6. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. §§ 7604(a)(2), 28 U.S.C. §§ 1331, 1346(a)(2), and 1361.

7. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (e), and 1402(a)(1).

8. Each of the Plaintiff States brings this action both in its own capacity as a sovereign State and as *parens patriae* on behalf of its citizens. In addition to seeking to preserve and protect their own economic and property interests, the Plaintiff States also seek to preserve and protect quasi-sovereign interests on behalf of their citizens. Specifically, the Plaintiff States seek to secure all benefits to human health and welfare due to their citizens under the federal Clean Air Act and to protect general economic interests on behalf of their citizens.

STATUTORY BACKGROUND

9. The Clean Air Act establishes a regulatory scheme designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7401(b)(1).

10. The Clean Air Act regulates air pollution through a complex array of mechanisms that are aimed at regulating types of pollutants or pollution (such as "criteria pollutants," hazardous pollutants, acid rain, or stratospheric ozone) or categories of sources (such as mobile or stationary). One of the most important of these mechanisms is the use of National Ambient Air Quality Standards (NAAQS) to regulate common and widely-distributed pollutants on the basis of information on their health and/or environmental effects. Such pollutants are commonly referred to as "criteria pollutants."

11. Regulation of a criteria pollutant starts with its being "listed" pursuant to Section 108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1). Section 108(a)(1) mandates that "the Administrator shall ... publish, and shall from time to time thereafter revise, a list which includes each air pollutant – (A) emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and (C) for which air quality criteria had not been issued before December 31, 1970, but for which [the Administrator] plans to issue air quality criteria under this section.

12. After a criteria pollutant is "listed," EPA must set air quality criteria, 42 U.S.C. § 7408(a)(2), and ambient air quality standards, 42 U.S.C. § 7409(a)(2), which are the levels of each listed pollutant in the ambient air that EPA deems to be protective of public health (primary NAAQS) and welfare (secondary NAAQS), 42 U.S.C. § 7409(b). Ultimately, implementation of the ambient air quality standards occurs through federally approved state

plans or federal implementation plans. 42 U.S.C. §§ 7410(a) and (c).

13. Section 302(g) of the Act, 42 U.S.C. § 7602(g), broadly defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."

14. Section 302(h) of the Act, 42 U.S.C. § 7602(h), defines effects on "welfare" to include, among other things, "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants."

15. Section 302(z) of the Act, 42 U.S.C. § 7602(z) defines "stationary source" to be "any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title."

16. Section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), provides that any person may commence a civil action on his own behalf against the Administrator based on an alleged failure of the Administrator to perform any nondiscretionary act or duty under the Act.

FACTUAL BACKGROUND

* * *

CAUSE OF ACTION

Failure to Perform a Nondiscretionary Duty Pursuant to CAA § 304(a)(2)

114. The Plaintiff States reallege and incorporate by reference the allegations of paragraphs 1-113 as if they were restated in full.

115. Carbon dioxide is a "physical, [or] chemical . . . substance or matter" within the meaning of Section 302(g) of the Act, 42 U.S.C. § 7602(g).

116. The human activities set forth in paragraph 24, above, produce carbon dioxide as a result of the burning of fossil fuels. Such carbon dioxide is "emitted into or otherwise enters the ambient air" within the meaning of Section 302(g) of the Act, 42 U.S.C. § 7602(g).

117. Carbon dioxide is an "air pollutant" within the meaning of Section 302(g) of the Act, 42 U.S.C. § 7602(g).

118. The Administrator has made a "judgment" that emissions of carbon dioxide cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare within the meaning of Section 108(a)(1)(A) of the Act, 42 U.S.C. § 7408(a)(1)(A).

119. Power plants and industrial facilities that generate electricity from the burning of fossil fuels are "stationary sources" of carbon dioxide within the meaning of Sections 108(a)(1)(B) and 302(z) of the Act, 42 U.S.C. §§ 7408(a)(1)(B), 7602(z).

120. Internal combustion engine vehicles, such as passenger cars, trucks, motorcycles and buses are "mobile sources" of carbon dioxide emissions within the meaning of Section 108(a)(1)(B).

121. Carbon dioxide is present in the ambient air as a result of "numerous or diverse mobile or stationary sources," within the meaning of Section 108(a)(1)(B) of the Clean Air Act, 42 U.S.C. § 7408(a)(1)(B).

122. By failing to revise the list of air pollutants under Section 108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1), to include carbon dioxide, the Administrator has failed to perform a nondiscretionary duty within the meaning of Section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2).

123. By so violating Section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), EPA is unlawfully increasing the likelihood of harming the economic interests of the Plaintiff States, is unlawfully increasing the likelihood and severity of damage to property owned by each of the Plaintiff States, is unlawfully denying residents of each of the Plaintiff States the benefits due them under the federal Clean Air Act, and is unlawfully subjecting residents of each of the Plaintiff States to increased risks of harm to human health, welfare, and general economy that are associated with the continued unregulated emissions of carbon dioxide.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff States request that this Honorable Court:

1. Order the Administrator to revise the list of air pollutants pursuant to Section 108(a)(1) of the

Act, 42 U.S.C. § 7408(a)(1), to include carbon dioxide.

2. Award the Plaintiff States their costs of this action and attorneys' fees; and

3. Grant such other relief as the Court deems just and proper.

Respectfully Submitted,

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Dated: June 4, 2003

Appendix B Plaintiffs' notice of dismissal of D. Conn. case seeking order for EPA to list carbon dioxide as a "criteria" pollutant under section 108 of the Clean Air Act, in light of pending *Commonwealth of Massachusetts v. EPA* D.C. Circuit case

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

COMMONWEALTH OF MASSACHUSETTS, STATE OF CONNECTICUT, and STATE OF MAINE, Plaintiffs, v. MARIANNE L. HORINKO, in her capacity as ACTING ADMINISTRATOR of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	CIVIL ACTION NO. 3:03CV984 (PCD)

PLAINTIFFS' NOTICE OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, plaintiffs Commonwealth of Massachusetts and the States of Connecticut and Maine (collectively, the Plaintiffs), acting by and through their respective Attorneys General, notify this Court that they are dismissing their action without prejudice. As background to this notice, the Plaintiffs state as follows:

1. In 1999, various environmental groups filed an administrative petition requesting EPA to regulate the emission of carbon dioxide and other greenhouse gases from cars and other "mobile sources" pursuant to Section 202 of the Clean Air Act. EPA's inaction on this petition ("the 202 Petition") led two of the petitioners and the Sierra Club to file a law suit in August of 2002 alleging that EPA had unreasonably delayed a ruling on the petition. On August 28, 2003 – four years after the 202 Petition was submitted and one year after the "unreasonable delay" suit was filed – EPA denied the 202 Petition. In that denial, EPA formally announced for the first time its position that it has no jurisdiction under the Clean Air Act to regulate greenhouse gases, in the process "withdrawing" formal statements issued to the contrary in 1998, 1999, and 2000.

2. On August 28, 2003, the very same day that it denied the 202 Petition, EPA served a Motion to Dismiss this lawsuit, in which EPA highlights its "recent" action on the 202 Petition. As one of the grounds for its motion, EPA argued that since it had now ruled that it had no authority to regulate greenhouse gases and since a challenge to its denial of the 202 Petition must be filed in the Court of Appeals for the D.C. Circuit, this Court lacks jurisdiction to grant the relief the Plaintiffs are seeking in this action. The defendant has not filed an Answer or a Motion for Summary Judgment.

3. EPA's newly-minted position that it lacks jurisdiction to regulate greenhouse gases was

formulated in the context of the ongoing litigation and its issuance was plainly driven by the agency's need to respond to the Plaintiffs' Complaint. The new position is therefore not entitled to any deference. *See e.g., Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212-13, 109 S.Ct. 468, 473-74 (1988). Without conceding that this Court lacks jurisdiction to review the scope of EPA's authority, however, the Plaintiffs agree that that issue is now better presented to the D.C. Circuit. In fact, the Plaintiffs themselves intend to file such a challenge.

4. Given these circumstances, the Plaintiffs hereby give notice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure that they are dismissing their present action without prejudice. The Plaintiffs intend to re-file this case upon a decision by the D.C. Circuit rejecting EPA's position that it lacks authority to regulate greenhouse gases (or a decision declining to reach the issue).

For these reasons, Plaintiffs hereby provide notice in accordance with Rule 41(a) of the Federal Rules of Civil Procedure that they have dismissed their action without prejudice.

Respectfully Submitted,

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Dated: September 3, 2003

Appendix C State Petitioners' Statement of Issues in D.C. Circuit case challenging EPA failure to include greenhouse gas emission limitations in New Source Performance Standards for boilers

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COKE OVEN ENVIRONMENTAL TASK FORCE,	
Petitioner,	
v.	**Case No. 06-1131 (and consolidated cases)**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,	
Respondents.	

NON-BINDING STATEMENT OF ISSUES OF PETITIONERS STATE OF NEW YORK, ET AL.

Petitioners State of New York, et al. in Case No. 06-1148, provide the following nonbinding statement of issues they intend to raise in this case:

1. Does the United States Environmental Protection Agency (EPA) have the authority to regulate emissions of carbon dioxide from stationary sources under section 111 of the Clean Air Act, 42 U.S.C. § 7411, based on the effect of carbon dioxide on public health or welfare, which encompasses, among other things, impacts on climate and weather?

2. Did EPA act unlawfully or arbitrarily in setting the new source performance standards for emissions of sulfur dioxide and nitrogen oxides from electric utility steam generating units at levels that can be achieved without application of the best system of emissions reduction that has been adequately demonstrated?

Dated: May 26, 2006

Respectfully submitted,

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Appendix D Joint motion to hold portion of New Source Performance Standards petition for review in abeyance pending outcome of *Commonwealth of Massachusetts v. EPA*, Supreme Court No. 05-1120

BRIEFING AND ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

COKE OVEN ENVIRONMENTAL TASK FORCE, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	Docket No. 06-1131 (and consolidated cases)

JOINT MOTION TO SEVER PORTIONS OF CASE NOS. 06-1148 AND 06-1149 AND HOLD IN ABEYANCE

Petitioners Environmental Defense, Sierra Club, and Natural Resources Defense Council (collectively "Environmental Group Petitioners"); the States of New York, California, Connecticut, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin, the Commonwealth of Massachusetts, the District of Columbia and the City of New York (collectively "State Petitioners") and Respondents United States Environmental Protection

Agency, and Stephen L. Johnson, in his capacity as Administrator, United States Environmental Protection Agency (collectively "EPA"), jointly move this Court to sever the first issue raised in Case Nos. 06-1148 and 06-1149, relating to carbon dioxide and other greenhouse gas emissions, assign that issue its own case number, and hold this severed case in abeyance pending action by the Supreme Court in *Commonwealth of Massachusetts v. EPA,* 415 F.3d 50, 58 (D.C. Cir. 2005), *cert. granted,* 2006 WL 1725113 (Jun. 26, 2006). *See infra* paragraph 5.

This joint motion reflects a partial resolution of the differences between the moving parties with respect to EPA's pending Motion to Hold the Consolidated Cases in Abeyance and Remand the Record filed on June 14, 2006. Specifically, the moving parties have reached agreement on a joint proposal to defer briefing of issues relating to carbon dioxide and other greenhouse gas emissions until after the Supreme Court decides the *Massachusetts* case as described above and in paragraph 5, *infra.*

The moving parties have not reached agreement, however, on whether the remaining issues raised by these petitions, concerning the emission standards for sulfur dioxide ("SO2") and nitrogen oxides ("NOx"), should be stayed. The State and Environmental Group Petitioners believe that issues regarding the adequacy of the S02 and NOx standards should be briefed now, while EPA believes those issues should be deferred until EPA resolves the petitions for reconsideration relating to other technical aspects of the final rule. Accordingly, that question remains before the Court in the context of EPA's pending motion of June 14, 2006.

In support of the joint motion, the parties state:

1. Five separate petitions, now consolidated, were filed in April 2006 by the Coke Oven Environmental Task Force, Council of Industrial Boiler Owners, Utility Air Regulatory Group, Environmental Group Petitioners, and State Petitioners. Petitioners seek review of EPA's final rule entitled, "Standards of Performance for Electric Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units," 71 Fed. Reg. 9,866 (Feb. 27, 2006). This regulation establishes new emissions standards for nitrogen oxides, sulfur dioxide, and particulate matter for certain types of steam generating units pursuant to EPA's authority under Clean Air Act section 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B). In taking this final action, EPA also declined to establish standards for carbon dioxide and other greenhouse gas emissions from these sources.

2. On June 14, 2006, EPA filed a Motion to Hold the Consolidated Cases in Abeyance and Remand the Record. Industry Petitioners consented to EPA's motion. On June 26, 2006, State and Environmental Group Petitioners filed a response opposing in part the relief EPA requested. Specifically, these petitioners opposed EPA's request for a remand of the administrative record and a stay of their petitions challenging EPA's decision not to regulate carbon dioxide and other greenhouse gas emissions as well as the emission standards established for sulfur dioxide and nitrogen oxides in the final rule. Opp. at 1-2. State and Environmental Group Petitioners did not oppose a stay of Industry Petitioners' cases for seven months to allow EPA to complete the administrative reconsideration process or a stay of Environmental Group Petitioners' challenge to

particulate matter emission standards. Opp. at 12. EPA's reply in support of its motion is due on July 10, 2006.[1]

3. On June 26, 2006, the Supreme Court granted certiorari in *Commonwealth of Massachusetts v. EPA*, 415 F.3d 50, 58 (D.C. Cir. 2005), *cert. granted*, 2006 WL 1725113 (Jun. 26, 2006). All of the State and Environmental Group Petitioners (with the exception of the State of Wisconsin) are parties in the *Massachusetts* case.

4. The question presented in the *Massachusetts* certiorari petition regarding whether EPA has the legal authority to regulate to greenhouse gases under the Clean Air Act may be dispositive of some or all of the carbon dioxide and other greenhouse gas issue raised by State and Environmental Group Petitioners in these consolidated cases. *See* Opp. Exs. D, E (Non-Binding Statement of Issues filed in Case Nos. 06-1148 and 06-1149).

5. Because of this change in circumstances, the parties now jointly move that the issue related to regulation of carbon dioxide and other greenhouse gas emissions raised in Case Nos. 06-1148 and 06-1149 be severed from the consolidated cases, given a new case number, and held in abeyance until the Supreme Court issues a decision in the *Massachusetts* case.[2] Within 30 days of a decision in

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[1] On June 28, 2006, EPA filed an unopposed motion for a one week extension of its deadline to file its reply brief due to severe flooding in Washington D.C. that had closed the offices of EPA. The Court has not yet acted on EPA's motion. Pursuant to Circuit Rule 27(h)(4), the time for filing of its reply is automatically extended until the Court acts.

[2] This joint motion does not alter EPA's motion to hold the Industry Petitioners' cases (Case Nos. 06-1131, 06-1154, 06-1155) in abeyance for seven months to allow EPA to complete the administrative reconsideration process, which has been consented to by all Petitioners.

the *Massachusetts* case, the parties will advise the court on how the severed case should proceed in light of the Supreme Court's ruling.

6. If the Court grants the relief requested in paragraph 5, *supra,* EPA will withdraw its request to remand the record made as part of its June 14, 2006 motion. However, EPA reserves the right to request a remand of the administrative record after the Supreme Court rules on the *Massachusetts* case and State and Environmental Petitioners reserve the right to object to such a request.

7. If the Court declines to grant the parties' joint motion herein, EPA renews it request to remand the record for the reasons stated in its June 14, 2006 motion and its reply brief filed separately today. State and Environmental Petitioners object to EPA's request for the reasons stated in their June 26, 2006 opposition.

8. The parties continue to disagree on how to proceed with the remaining issues regarding the NOx and SO2 standards raised in Case Nos. 06-1148 and 06-1149. EPA intends to further address this disagreement in the context of its reply papers on the June 14, 2006 motion. In view of the change of circumstances occasioned by the Supreme Court action, EPA has no objection to allowing the State and Environmental Petitioners to file a surreply not to exceed 5 pages by July 17, 2006.

WHEREFORE, the parties respectfully request that the Court: (1) sever issue no. 1 identified in the Non-Binding Statement of Issues filed in Case Nos. 06-1148 and 06-1149 from these consolidated cases and assign the severed portion a separate docket number; (2) order this severed portion to be held in abeyance until the Supreme Court issues a decision in *Commonwealth of Massachusetts*

v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005), *cert. granted*, 2006 WL 1725113 (Jun. 26, 2006); (3) order the parties to file a report in the severed case advising the Court of their views on how the litigation should proceed within 30 days after the abeyance period expires, and (4) on the condition that the above relief is granted by the Court, deem EPA's Motion to Hold the Consolidated Cases in Abeyance and Remand the Record withdrawn, without prejudice, to the extent it seeks voluntary remand of the administrative record.

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